IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 24, 2006 Session

STATE OF TENNESSEE v. JOHNNY M. BURROUGHS

Appeal from the Circuit Court for Dickson County
No. CR-6715 George C. Sexton, Judge

No. M2005-00900-CCA-R3-CD - Filed March 9, 2006

The appellant, Johnny M. Burroughs, was indicted in July of 2003 by the Dickson County Grand Jury along with two other co-defendants on charges of first degree murder, conspiracy to commit first degree murder, especially aggravated robbery, conspiracy to commit especially aggravated robbery, theft of property over one thousand dollars and conspiracy to commit theft of property. At the conclusion of the State's proof, the State elected not to proceed on the charges of conspiracy to commit especially aggravated robbery and conspiracy to commit theft. As a result, the trial court granted a motion for judgment of acquittal on those charges. The jury subsequently returned a verdict of guilt for felony murder, especially aggravated robbery and theft of property over one thousand dollars. The jury sentenced the appellant to life in prison for the felony murder. The trial court sentenced the appellant to twenty years for the especially aggravated robbery conviction and two years for the theft of property conviction, to be served concurrently to the appellant's life sentence. The appellant filed a motion for new trial, which the trial court denied. On appeal, the appellant argues that the evidence was insufficient to support the felony murder and especially aggravated robbery convictions and that double jeopardy prohibits the appellant's conviction for especially aggravated robbery after the trial court granted the judgment of acquittal on the charge of conspiracy to commit especially aggravated robbery. For the following reasons, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL, and ROBERT W. WEDEMEYER, JJ., joined.

James L. Baum, Burns, Tennessee, for the appellant, Johnny M. Burroughs.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Dan Alsobrooks, District Attorney General; and Suzanne Lockert, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On May 3, 2003, Paul Totty and Grandville Johnson were hunting in the woods in Hickman County when they discovered a red Nissan truck. The next day, the two men noticed that the truck had been set on fire. The truck was also seen smoldering by Robert Allen Orton. Mr. Orton called 911 to report what he found in the woods.

The police were dispatched to the location of the burning truck and soon discovered that the truck belonged to Jean Bowen, the victim. The victim lived in Dickson County. According to her sister, Nell Brown, the two women were supposed to have a picnic on May 2, 2003. Ms. Brown became concerned when her sister did not show-up for the picnic and called Sandra Parker, the victim's daughter. When Ms. Parker drove by her mother's house, she noticed that her mother's red Nissan truck was not parked in the driveway and assumed that her mother was out running errands or visiting someone.

On May 4, 2003, after the authorities confirmed that the truck belonged to the victim, Peter Rogers, a Deputy Sheriff with the Dickson County Sheriff's Department, was dispatched to the victim's house. Deputy Rogers noticed what he thought were "spots of blood" on the front porch. Deputy Rogers knocked on the door, but received no response. When Deputy Rogers looked through the window on the front porch of the small farmhouse, he could see the victim lying in a pool of blood. Without entering the house, Deputy Rogers could tell that the victim was "deceased" because "her body was stiff, real ridged like" and "the blood on her was almost a black or a purple color and you could tell it was dry."

The victim's body was found in the kitchen of the house, lying on the floor next to the freezer. There was blood spattered on the freezer and the wall. After talking to the victim's daughter, the authorities were able to determine that the victim's purse and shotgun were missing in addition to the victim's red Nissan truck. There were no identifiable latent finger prints recovered from the scene of the crime.

According to the medical examiner, the victim died as a result of multiple injuries, including "extensive skull fractures, facial bone fractures," contusions to the brain and blunt force injuries to the torso. Several of the injuries to the face and head were consistent with being struck with a hatchet.

During the investigation, the authorities received information that the victim's nephew, Greg Smith, had tried to borrow money from the victim and that he became upset when she refused to give him money. The appellant was one of Greg Smith's close friends.

On the evening of May 15, 2003, the appellant along with Greg Smith and Vicki Spicer, the two co-defendants, visited Dwight Eric Halbrooks's home in Hickman County. The appellant came

to the house to sell Mr. Halbrooks a shotgun that the appellant claimed he got from his father.[1] The appellant also offered to sell Mr. Halbrooks a red Nissan that was stolen in Dickson. Mr. Halbrooks bought the gun for twenty-five dollars, but declined to buy the truck.

After hearing about the robbery and murder in Dickson County, Mr. Halbrooks had his nephew hide the shotgun, thinking that it might be the murder weapon involved in the news reports. Mr. Halbrooks later turned the gun over to agents from the Tennessee Bureau of Investigation.

On May 15, 2003, Agent Douglas Long of the Tennessee Bureau of Investigation went with Detective B.J. Gafford of the Dickson County Sheriff's Department to the trailer park in Centerville, Tennessee where the appellant lived. The two officers approached the appellant and asked him to come in and give a statement. The appellant complied by riding in the car with the officers to the Criminal Justice Center in Hickman County. Prior to the statement, the officers obtained a waiver of rights from the appellant and informed him of his Miranda rights.

The appellant's statement reads as follows:

> On Friday night, May 2, 2003, me and Greg Smith were riding around in Marenda Campbell's blue Thunderbird. It was around 8:00 p.m. and we were driving down I-40 heading west. He and I had been riding around Dickson. As we were coming down the interstate, I was driving and we noticed that the car was running hot. The engine was about to shutdown because it was running so hot. Greg told me to pull off the exit, so I did. We turned left and went back over the interstate and pulled over at the stop sign at the top of the hill. We both get out of the car and raised the hood. We're checking the radiator and then go to the trunk to see if there is any water. Greg then grabbed the one-way lug wrench. He tells me he has an aunt that lives close by. We could see the house from where we were. We start walking towards her house. As we are walking towards her house, he started telling me that he was going to jail for four or five years because he had failed a drug test. He was on probation for stealing a toolbox. He said he wanted to rob her, take her money. He kept saying she had a bunch of money. He said that he wanted to give the money to his girlfriend so she could pay rent while he was in jail.
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> When we got to the house, the street light was on, and the porch light was on. Greg knocked on the door and she came to the door and opened the wooden door. The screen door was closed. Greg tells her who he is and that he needs water for his car that was parked up the street. She tells us to come in and she opens the door. Greg goes in first and I follow him. The lug wrench is either in his back pocket or stuck in the back of his pants. While we were standing in the living room, he tells her he needs a big jug to put water in. They go into the kitchen. The doorway to the kitchen was to my right as I stood in the living room. The TV was to my right and

[1] The shotgun actually belonged to the victim.

the couch was in front of me. When Greg and her went into the kitchen, I heard Greg say something about a jug and then heard some commotion. It sounded like somebody fell on some pots and pans. It sounded like something kept hitting pans. I heard this sound five to six times. I was standing in the living room looking around. Greg is in the kitchen for a minute to a minute and a half. As he comes out of the kitchen, he has the lug wrench in his hand. When he came out of the kitchen, he went over to the couch and grabbed a brown paper bag that had her purse inside. I don't know what happened to the paper bag. After he grabbed the purse he turns to me and says let's go. I don't remember if he went anywhere else in the house. As we go towards the door, he is in front of me. He sees the shotgun in the corner next to the door. He grabbed the shotgun and goes outside the house, with me following him. He has the purse, shotgun, and lug wrench in his hand. I think he was carrying the purse and shotgun in his left hand and the lug wrench in his right hand. Greg is right handed. As we leave the house, I turn and head for the street and he goes for the truck. The truck is parked in the carport to the right of the house as you look at it. As I am running up the hill, he passes me in a red Nissan. The truck had a toolbox behind the cab.

When I got to the top of the hill, I closed the hood and the trunk and got in. Greg was already on the interstate. I get on the interstate and start heading towards the Turney Center exit. I'm driving about 85 to 90 trying to catch him. I finally see him about a mile before the Turney Center exit. He had pulled over waiting on me. He pulls out and gets off the exit. I follow him off the interstate. When we get to the top of the exit we take a left [and] start driving down the new highway. We finally turn right on the backside of Beaver Dam Road. We drive down the road and finally turn left onto an old logging road. I follow him a little ways, until there is an open spot. I didn't go any further because I would have bottomed out. Greg drove the truck back away's [sic] through some mud holes. He is gone for about 10 minutes and comes back. He parked the truck facing me, facing the way we came in. He has the driver's door open and begins throwing stuff out while he is standing outside the door. He threw out the brown console cup holder, some papers, a bunch of blank checks, a yellow folder, a U.S. coin collector's kit. I was standing in front of the truck during this. He reached behind the seat and grabbed the shotgun. I'm not for sure what he did with the lug wrench, he may have thrown it in the woods. After he grabbed the shotgun he gave it to me. The shotgun was a 20 gauge single shot. I put it in the trunk of the car. At that time he was going through the purse. He got her money. I think it was about $60.00. He got a ring and it had a blue setting in it. He also got a silver watch or bracelet. He left the purse in the truck. We got in the car and left. I was driving at that time. We went to the trailer park. It was around 12:00 to 12:30. I went to my trailer and he went to his.

Saturday mor[n]ing around 11:30 Greg and I left in Marenda's car. We went to Eric Highbrooks [sic] house on Bear Creek. We went up to the door and asked

him if he wanted to buy the shotgun. He asked what kind and I told him it was a 20 gauge. He agreed and gave us a 20 sack of weed. We left and went back to the trailer park and smoked it. We hung around the trailer park most of the day. Later that evening, almost dark, Greg came over asking if I knew anybody that would by [sic] the truck and I told him no. He said he had to get rid of the truck. As we were walking around, he said something about burning it and I said that I had a gas can. My gas can is a one gallon can. It's plastic and red. I gave him the gas can and he said he was going to burn the truck. Later that night the Thunderbird was gone, so I assumed that he had gone to burn the truck. I didn't see Greg until Sunday evening.

On Sunday evening Marenda's dad came over and said they found the truck burnt where he worked. I guess he does some kind of logging. On Monday or Tuesday Greg came and started talking about what happened and I told him I didn't want to talk about it. I was trying to forget about it.

The appellant also made two supplements to his statement. In the first supplement, the appellant stated the following.

I think Greg still has the ring and the watch or bracelet. I saw him stick the ring and bracelet in his pocket. It was already in a paper towel.

Greg was wearing blue jeans and a white T-shirt and a black baseball hat that may have some racing [sic] on it. She was wearing blue jeans. I don't remember what type of shirt she was wearing.

I don't know where he got the keys to the truck. As I was going towards my car, I had passed the 1st stop sign and was halfway up the hill when he passed me in the truck.

The second supplement read as follows:

Vicki: Stayed with the car while it was parked at the CB shop. She did not go to the house with me and Greg to rob Greg's aunt. When I got back to the car she was still waiting with the car. Vicki did not know what had happened at that time and I did not tell her what happened. She did not know that Greg's aunt was dead until she heard the news later.

I was in the truck the night the truck was burned. Greg and I drove Greg's girlfriends [sic] car, a blue Thunderbird. I was driving the car and Greg was riding as a passenger. I cannot remember if Vicki was with us. We drove back up to where we had left [sic] the truck on the logging road. Before we burned the truck I drove the truck and Greg drove it. I wrecked it maybe twice. I did the damage to the bed by backing the truck up into a tree and by sideswiping a tree. I was in the truck by

> myself when I wrecked it. Greg also wrecked the truck and did damage to it. The wrecking and burning the truck took place sometime between 11:30 p.m. and 12:00 a.m. on Saturday, May 3, 2003.
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> While inside Greg's aunt's house, both Greg and I saw her still moving after Greg had already hit her and she was laying on the floor. Greg went back over to where she was laying on the floor and hit her with the one-way lug wrench 2 or 3 more times in the head.

At the conclusion of the State's proof, counsel for the appellant made a motion for judgment of acquittal. At that time, the State elected not to proceed on the conspiracy counts. As a result, the trial court granted the motion for judgment of acquittal on the conspiracy to commit theft and conspiracy to commit especially aggravated robbery counts.[2] After deliberating, the jury convicted the appellant of first degree felony murder, especially aggravated robbery and theft of property.

During the sentencing phase of the trial, the jury heard testimony from the victim's daughter and sister as well as testimony from the appellant's sister. After deliberating, the jury determined that one aggravating factor, the murder was knowingly committed during a robbery or fleeing from a robbery or aiding in a robbery, was present and sentenced the appellant to life in prison for the felony murder. At a later sentencing hearing, the trial court sentenced the appellant to twenty years for the especially aggravated robbery and two years for the theft of property.

Subsequently, the appellant filed a motion for new trial arguing that the convictions for felony murder and especially aggravated robbery should be barred due to double jeopardy because after the trial court entered a judgment of acquittal on the conspiracy charges "jeopardy attached and . . . the conduct was the same and the elements substantially the same" for the conspiracy charge and the robbery charge. The appellant also argued that the evidence was insufficient to sustain the convictions, the trial court erred in entering certain pictures into evidence, the trial court erred in admitting the statement of the appellant, the trial court erred by allowing the State to introduce evidence relating to the burning of the truck and the trial court erred by allowing the jurors to keep copies of the appellant's statement throughout the trial. According to an order entered March 15, 2005, the trial court denied the motion for new trial. A transcript from that hearing is not a part of the record on appeal.

The appellant filed a timely notice of appeal. On appeal, the appellant presents the following issues: (1) whether the trial court erred by denying a motion for judgment of acquittal where the evidence was insufficient to support a conviction for especially aggravated robbery and felony murder; and (2) whether double jeopardy bars a conviction for especially aggravated robbery after

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[2] Although the transcript is not clear, it appears from the judgment forms that the trial court also granted a motion for judgment of acquittal on the conspiracy to commit first degree murder charge. The judgment form for this charge indicates that it was dismissed.

a judgment of acquittal is entered on a charge of conspiracy to commit especially aggravated robbery.

Analysis

In his first issue, the appellant argues that the trial court "erred by denying a motion for judgment of acquittal where the evidence was insufficient to support a conviction on especially aggravated robbery and felony murder." Specifically, the appellant contends that because there was no evidence that the appellant "personally threatened or committed any violence against the victim, his conviction was based on being criminally responsible for the acts of Greg Smith" and that because there was no evidence that the appellant "performed any act to aid or attempt to aid Greg Smith until after the especially aggravated robbery and murder had been accomplished," the evidence was insufficient to convict him of felony murder and especially aggravated robbery. The State disagrees, claiming that the appellant's "actions were absolutely consistent with the provision in the criminal responsibility subsection, i.e., he acted with the intent to promote or assist in the commission of the robbery, to benefit in the proceeds of the robbery, and aided Smith in committing the robbery that led to the murder."

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." Matthews, 805 S.W.2d at 779.

Under Tennessee law, a person may be charged with an offense if "he or she is criminally responsible for the perpetration of the offense." Tenn. Code Ann. § 39-11-401, Sentencing Comm'n Cmts. A person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Tenn. Code Ann. § 39-11-402(2). Criminal responsibility is not a separate crime; rather, it is "solely a theory by which the State may prove the defendant's guilt of the alleged offense, . . . , based upon

the conduct of another person." State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999). Under a theory of criminal responsibility, an individual's presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from which his or her participation in the crime may be inferred. See State v. Ball, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). No particular act need be shown, and the defendant need not have taken a physical part in the crime in order to be held criminally responsible. See id. To be criminally responsible for the acts of another, the defendant must "'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" State v. Maxey, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting Hembree v. State, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)).

To obtain a conviction for especially aggravated robbery, the State had to show an intentional or knowing theft of property from the person of another by violence or putting the person in fear, "[a]ccomplished with a deadly weapon[,]" and "[w]here the victim suffers serious bodily injury." Tenn. Code Ann. § 39- 13-403(a). To obtain a conviction for first degree felony murder, the State had to prove "[a] killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy [.]" Tenn. Code Ann. § 39-13-202(a)(2). Tennessee Code Annotated section 39-13-202 also provides that "[n]o culpable mental state is required for conviction under subdivision (a)(2) . . . except the intent to commit the enumerated offenses or acts." Tenn. Code Ann. § 39-13-202(b). Additionally, the death must occur "in the perpetration of" the enumerated felony. State v. Hinton, 42 S.W.3d 113, 119 (Tenn. Crim. App. 2000) (citations omitted). The killing may precede, coincide with, or follow the felony and still be in the perpetration of the felony, so long as there is a connection in time, place, and continuity of action. State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999). If the underlying felony and killing were part of a continuous transaction with no break in the chain of events and the felon had not reached a place of temporary safety between the events, felony murder is sufficiently established. State v. Pierce, 23 S.W.3d 289, 294-97 (Tenn. 2000). Proof of the intention to commit the underlying felony and at what point it existed is a question of fact to be decided by the jury after consideration of all the facts and circumstances. Buggs, 995 S.W.2d at 107. When one enters into a scheme with another to commit one of the felonies enumerated in the felony murder statutes, and death ensues, both defendants are responsible for the death regardless of who actually committed the murder and whether the killing was specifically contemplated by the other. Hinton, 42 S.W.3d at 119; State v. Brown, 756 S.W.2d 700, 704 (Tenn. Crim. App. 1988).

Having carefully reviewed the record, we conclude that the evidence is sufficient to support the jury's verdict in this case. Viewed in the light most favorable to the State, the proof at trial establishes that the victim was killed during a robbery. The appellant went with Greg Smith to his aunt's house knowing that Smith planned to rob the aunt in order to provide his girlfriend with money so that she could pay the rent while Smith was in jail for violating his probation. The appellant's statement indicates that he saw Smith with the lug wrench in his "back pocket or stuck in the back of his pants." The appellant admitted that "while inside Greg's aunt's house, both Greg and I saw her still moving after Greg had already hit her and she was laying on the floor. Greg went

back over to where she was laying on the floor and hit her with the one-way lug wrench 2 or 3 more times in the head." After Smith killed the victim, the two left the house in a hurry while Smith carried the victim's purse and shotgun. Smith got into the victim's truck and sped off, but the appellant followed in the car. They took the truck out to the woods and abandoned it. Later, the two men went to the home of Eric Halbrooks where the appellant sold the stolen shotgun and tried to sell the stolen truck. The appellant and Smith later returned to the woods, and rode around in the truck several times prior to burning it. Thus, in spite of the appellant's attempts to show that Smith acted alone, sufficient evidence was presented from which a rational trier of fact could have found the appellant guilty beyond a reasonable doubt of felony murder and especially aggravated robbery. This issue is without merit.

Double Jeopardy

Next, the appellant contends that his convictions for especially aggravated robbery and felony murder should be barred by double jeopardy because the elements of especially aggravated robbery and conspiracy to commit especially aggravated robbery overlap such that the trial court's grant of the motion for judgment of acquittal on the conspiracy count effectively encompassed the charge of especially aggravated robbery. The State disagrees.

To determine whether multiple convictions are permitted, this Court must: (1) conduct an analysis of the statutory offenses pursuant to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932); (2) analyze the evidence used to prove the offenses; (3) consider whether there were multiple victims or discrete acts; and (4) compare the purposes of the respective statutes. State v. Denton, 938 S.W.2d 373, 381 (Tenn. 1996). In State v. Hayes, 7 S.W.3d 52 (Tenn. Crim. App. 1999), this Court explained that the first step in deciding whether double jeopardy prevents more than one punishment focuses on whether the offenses are the same under Blockburger. 7 S.W.3d at 55.

In the case herein, at the conclusion of the State's proof, the trial court granted the appellant's motion for judgment of acquittal on conspiracy charges. The jury then found the appellant guilty of felony murder and especially aggravated robbery. The appellant argues that because the crimes of especially aggravated robbery and conspiracy to commit especially aggravated robbery have "substantially" the same elements, double jeopardy prohibited his conviction for especially aggravated robbery after the grant of the motion for judgment of acquittal on the conspiracy charge. However, the appellant concedes that had the trial court not granted the motion for judgment of acquittal, it would have been possible under Tennessee Code Annotated section 39-12-106(c) to be convicted of both conspiracy and the offense that was the object of the conspiracy or, in this case, conspiracy to commit especially aggravated robbery and especially aggravated robbery. Thus, dual convictions for conspiracy to commit especially aggravated robbery and especially aggravated robbery would not have violated double jeopardy if the trial court had declined to grant the motion for judgment of acquittal because the offenses do not have the same elements. Accordingly, we fail to see how the grant of the motion for judgment of acquittal on the conspiracy charge prevented the appellant's conviction for especially aggravated robbery. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE